IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 24th July, 1996.

CRIMINAL APPEAL NO. 987 OF 1993

For Approval and Signature:

THE HON'BLE MR. JUSTICE S.D. DAVE

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ? No.

2. To be referred to the Reporter or not ? No.

3. Whether Their Lordships wish to see the fair copy of Judgment ? No.

4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? No.

5. Whether it is to be circulated to the Civil Judge? No.

Prakash Vitthalbhai Koli : Appellant.

Versus

The State of Gujarat : Respondent.

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Shri Adil V. Mehta, Advocate for the appellant.
Shri S.T. Mehta, Addl. Public Prosecutor for the respondent.

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Coram: S.D. Dave, J. & H.R. Shelat,J.
(24-7-1996)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The appellant, who is, on 12-7-1993, convicted of the offences under Section 307 and 384 I.P. Code, and sentenced to rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default rigorous imprisonment for one year more, of the offence under Section 307, Indian Penal Code, and rigorous imprisonment for one year and a fine of Rs.1,000/-, in default rigorous imprisonment for three months more of the offence under Section 384, Indian Penal Code, in Sessions Case No. 37/93 by the then learned Additional Sessions Judge, Bhavnagar, has preferred this appeal.

2. Briefly stated, the facts of the prosecution are that Manubhai Jaishanker Dave who is running his shop in the name and style of `Gayatri Provision' in Subhash Nagar area of the city of Bhavnagar, was on 12-11-1992 at 21.00 hours about to close his shop. At that time the appellant who is believed to be a well known ruffian went to him and demanded Rs.500/-. Manubhai Jaishanker, not having the amount, declined to pay. The appellant was therefore got wild, and suddenly started to shower knife blows on Manubhai Jaishanker Dave. After receiving the first blow Manubhai started to scuddle so as to save him, but the appellant chased him upto a distance of about 8 feet and succeeded in giving 2 to 3 knife blows more, with the result Manubhai Jaishanker sustaining bleeding injuries fell down on the ground shouting for help. Bhanubhai Ganeshbhai, Bharatbhai Bhikhabhai, Amarsinh R. Pandya and others hearing shouts and uproar rushed to the scene of offence. Reaching the scene of offence they could see Manubhai Jaishanker was lying on the ground in wounded condition with bleeding injuries and they also saw the appellant running away with the knife. Manubhai Jaishanker was then taken to the hospital for treatment. A complaint before 'B' Division police station of the city of Bhavnagar was then lodged. After the usual investigation, chargesheet was filed before the Court. The learned Magistrate at Bhavnagar was not completent to hear and decide the case. He therefore committed the same to the court of sessions at Bhavnagar which came to be registered as Sessions Case No. 37 of 1993. The case was assigned to the then learned Additional Sessions Judge at Bhavnagar who at the conclusion of the hearing appreciating the evidence before him found that the prosecution had established, beyond every reasonable doubt the charge levelled against the appellant. He therefore convicted and sentenced the appellant as aforesaid. Being aggrieved by that order of conviction and sentence, the appellant has preferred this appeal before this Court.

3. Initially the learned advocate representing the appellant argued on several grounds and made vehement attempts to assail the judgment and order on different grounds but after making

query when attention was drawn to the evidence enervating the arguments, he tapered of his submissions confining to alteration of sentence. According to him, looking to the evidence on record, the conviction under Section 384 was unsustainable, but the conviction under Section 307 could well be altered to any of the lesser offence.

4. On this point, the learned counsel representing the State is also heard. When before us the only point about alteration of sentence is raised, we would not dwell upon other points, but would confine to the only point of alteration of sentence.

5. In order to appreciate the submissions advanced, we may in brief deal with the ocular versions appearing on record. Manubhai Jaishanker Dave has been examined at Exh. 14. He has supported the case of the prosecution without missing a link, and in the cross-examination he is not shaken, he has stood firm, and has remained consistent. His evidence appears trustworthy. No infirmity is pointed out. Manubhai is also corroborated by the doctor who examined him and treated him in the hospital. Dr. Ashok D. Pandya (Exh.12) who treated him found three injuries namely (1) incise wound on the middle of the chest; (2) incise wound on lumber region; and (3) incise wound on left wrist-joint. An operation was performed. During the operation he could mark injury on peritonium and also haemotomise. According to the doctor, such injuries were possible by sharp-cutting instrument and the healing process would take about 10 to 15 days if no other complications arise.

6. Bharatbhai Bhikhabhai Bhatt (Exh. 60) has no doubt supported the case of the prosecution, but during the cross-examination he had to admit that he did not see the appellant giving the blows to Manubhai Jaishanker. He could only see the appellant scuddling with knife. His evidence therefore only shows that some incident did happen, and necessitates looking for other material on record. Bhanushanker Ganesh (Exh. 15) has also likewise initially supported the case of the prosecution stating that his brother was having a shop called `Satyanarayan Provision Store' where he was sitting at that time. That shop was very close to the shop of Manubhai Jaishanker. Manubhai Jaishanker shouted for help and he went there. He could see that Manubhai Jaishanker was injured and he saw the accused leaving the spot swiftly with the knife. Although this witness is not effectively cross-examined, his evidence leads us no further than occurance of the incident leaving the Court to have exercise of going through other materials on record so as to find the answer who did it ? Amarsinh R. Pandya is also supporting the say of the injured Manubhai but his testimony recorded at Exh. 17 cannot be relied upon as he has made several improvements in his versions before the Court than what he stated before the police. Though he did not state before the police, he

had the audacity to make the statements to the effect that he being the tenant of the injured had gone to the shop of the injured for the settlement of the rent due, when they were talking about the settlement, the appellant went there and demanded the money, injured Manubhai at that time asked him to leave the shop as he wanted to close, Manubhai informed him thereafter, that, that man-appellant was going to him and extorting money, after appellant got down, Manubhai was closing the shop, at that time altercation took place between the two, the accused-appellant then gave knife blow on the chest of Manubhai, when Manubhai started to run, knife blow was given on the back. When this witness has thus made material improvements on his say, his testimony can well be viewed with suspicion. There is no other direct evidence entirely supporting the prosecution. Abovestated two witnesses namely Bhanushanker and Bharatbhai to a little extent support. But as submitted their evidence is also kept out of consideration, in our view the prosecution has no reason to retreat. The evidence of injured Manubhai Jaishanker Dave , supported by the doctor, can safely be relied upon as his say is consistent, not shaken in cross-examination, he has stood firm, his say leaves no room to doubt, it inspires confidence and is convincing and credible. From his evidence, it can well be said that the appellant assaulted after he found that his attempt to extort money was being frustrated and caused injury by showering knife blows.

7. From these facts established on record, we have to examine which of the penal provision would come into play. Considering the injuries and the evidence of the injured, it cannot be said that the appellant gave knife blows with such intention or knowledge or under such circumstances that if by his such act death was caused he would be guilty of murder. Before we proceed, we think it proper to mention that similar question arose before this Court in the case of Mohanbhai Ranchhodbhai vs. State of Gujarat 1993 (1) G.L.H. 28, wherein it has been held that the lower court was not justified in holding the accused guilty of the offence under Section 307 and awarding sentence thereof. In that case the doctor found two injuries, one incise wound on the right side near abdomen and another incise wound on the right side of the stomach. In that case also by knife the injuries were caused and that knife was also ordinary one as we find in the present case. In that case, considering the material on record, this court found that the accused ought to have been convicted of the offence punishable under Section 326, Indian Penal Code and not under Section 307, and accordingly the conviction and sentence came to be altered. Similar is the case before us. No one had contemplated the incident. The injured was not knowing that appellant would at that time go to him. The appellant had no reason to believe that the injured would refuse to pay or resist to succumb to his bossiness. He was always of the impression that his evil repute as swash-buckler would make

his way easy alike past. For both accidentally undreamt came into being. The appellant was abominated as injured thought not to yield always. Further he was having no money on hand. The appellant then lost equanimity. He then took ill, and lost temper, got wild and started to give knife blow as his hankering was frustrated. Thus suddenly in the heat of excitement the appellant did the wrong. It therefore cannot be said that the act was the result of premeditation or well-planned. With a view to give sound thrasing and extort money and thereby satisfy his needs the appellant did the wrong. He must not have thought of the act covered by Sec. 307, I.P. Code. In view of such peculiar circumstances on record, the act of the appellant constitutes the offence of causing grievous hurt made punishable u/s. 326, I.P. Code. The conviction and sentence are therefore required to be altered.

8. Now the question of quantum of punishment arises for consideration. Considering the evidence and especially the circumstances in which the appellant committed the wrong, we think it proper that if the appellant is sentenced to 4 years rigorous imprisonment and fine of Rs.5,000/-, in default, rigorous imprisonment of one year more, it would meet the ends of justice.

9. The question about conviction and sentence of the offence under Section 384, Indian Penal Code called in question is required to be examined. That Section provides the punishment for extortion. The offence of extortion is completed if by putting any person in fear of any injury to that person, or to one else and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, and then if the accused in fact succeeds in receiving the person or property or valuable security, the offence of extortion will be constituted. If the accused does not succeed even after putting the person to fear of injury or death so as to have the custody of the person, or property or valuable security, it cannot be said that the offence punishable under Section 384 is constituted. In the case on hand the appellant as made clear by the injured, demanded the amount of Rs.500/-,but injured did not pay saying that he was having no money and so the appellant could not succeed in getting the sum. The appellant was therefore enraged and he then caused hurt. In view of this fact that the offence u/s. 384 cannot be said to have been constituted. However the learned Judge fell into error and held that the prosecution succeeded in establishing the charge of the offence under Section 384 and convicted and sentenced the appellant which is unsustainable. When thus the offence is not constituted,the conviction and sentence in that regard will have to be quashed and set aside.

10. In the result, the appeal requires to be partly allowed.

We accordingly allow the appeal partly, set aside the judgment and order of conviction of the offence under Section 384 Indian Penal Code and sentence inflicting imprisonment in that regard on the appellant, and acquit the appellant thereof, but we alter the conviction and sentence of the offence u/s. 307 I.P.C. to that of the offence under Section 326 of the Indian Penal Code, and sentence the appellant to 4 years rigorous imprisonment and fine of Rs.5,000/-, in default rigorous imprisonment for one year more. Muddamal be disposed of as ordered by the lower court.

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